SEP 6 1995

No. 95-223

In The

Supreme Court of the United States

October Term, 1995

CINCINNATI INSURANCE CO.,

Petitioner,

v.

ORANGEBURG SAUSAGE COMPANY,

Respondent.

Petition For Writ Of Certiorari To The South Carolina Court Of Appeals

MOTION FOR LEAVE TO FILE A BRIEF FOR THE SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS ASSOCIATION AS AMICUS CURIAE AND BRIEF IN SUPPORT OF THE PETITION

STEPHEN P. GROVES
YOUNG, CLEMENT, RIVERS & TISDALE, L.L.P.
P. O. Box 993
Charleston, SC 29402-0993
(803) 724-6688
Attorneys for South Carolina Defense Trial Attorneys Association

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

The South Carolina Defense Trial Attorneys Association hereby moves, pursuant to rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the Petitioner has consented to the filing of this brief; counsel for the Respondent has refused to consent.

The South Carolina Defense Trial Attorneys Association is an organization of attorneys in South Carolina who practice on behalf of insurance companies and other defendants and consists of almost a thousand members. Virtually all attorneys who practice civil defense litigation are members of the organization.

Defining the procedural and substantive limitations that the due process clause of the Fourteenth Amendment imposes on punitive damages is an issue of vital importance to the defense attorneys and their clients. Without meaningful standards and a rational plan of review, punitive damage awards are haphazard and the chance of such an award being the result of passion and prejudice is high. In the present case, not only have meaningful standards of review been ignored, but, as will be discussed, the decision itself represents the promulgation of review criteria which would be extremely prejudicial to wealthy defendants and would essentially make the defense of punitive damage allegations difficult, if not impossible. The criteria applied by the court are both irrational and prejudicial.

The defense attorneys have a particular interest in the questions presented by the Petition for Certiorari in this case in that without guidance regarding the kind of review that appellate courts must provide in deciding

whether a jury's award of punitive damages is constitutionally excessive, then awards such as the one in this case are inevitable. The present case provides the potential for findings which are so nebulous and so irrational that the possibility of a punitive damage award being influenced solely by passion and prejudice is not only possible, but in view of the criteria espoused by the appellate court of South Carolina would be likely.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the Petition for Certiorari.

Respectfully submitted,

STEPHEN P. GROVES
YOUNG, CLEMENT, RIVERS & TISDALE, L.L.P.
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Charleston, SC 29402-0993
(803) 724-6688
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To The South Carolina Court Of Appeals

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

QUESTIONS PRESENTED FOR REVIEW

Whether it comports with due process to allow punitive damages to be awarded based on "evidence" related solely to a plaintiff's unelected cause of action not before the court.

Whether it comports with due process for the trial and appellate courts to conduct post-trial reviews of a punitive damages award that do not adhere to the requirements established by this Court.

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I. INTEREST OF THE AMICUS CURIAE

The South Carolina Defense Trial Attorneys Association seeks permission to appear and argue as to the matters raised in the appeal of this case as amicus curiae. Petitioner has consented to our appearance as amicus but Respondent has not.

The South Carolina Defense Trial Attorneys Association is comprised of trial attorneys who practice extensively in the defense of civil lawsuits, often on behalf of insurance companies and their insureds. It is a statewide association consisting of 844 members. Although the organization advocates on behalf of insurance companies and the defendants in civil actions, its charter requires that it seek to "elevate the standards of trial practice . . . and promote improvements in the administration of justice" not only on behalf of members, but for "the community, state and nation."

Our By-Laws do not permit us to participate as amicus unless the issue is one of general and urgent importance to the association and the insurance defense community and the underlying case creates precedent that could work a substantial injustice.

Absent a meaningful scrutiny by the trial court and review by an appellate court, punitive damage awards may be made based on passion and prejudice. By their nature, punitive damage awards are awarded as the result of a jury's dislike of a defendant or its alleged practices. The excesses and irrationality which can accompany a jury's decision are real threats to our civil justice system. Insurance companies, whose decisions can

adversely affect insureds, are particularly at risk for such prejudice.

For years, decisions regarding punitive damage awards in South Carolina were left almost exclusively to the discretion of the trial jury. Recent United States Supreme Court decisions have required a more meaningful review. Although the South Carolina Supreme Court has attempted to conform South Carolina's system of review of punitive damages to the mandates of this Court, it has failed in its attempt, both in form and substance.

The *OSCO* decision represents a trial and appellate court "review" of punitive damages, consisting of merely a determination that the overall conduct of the insurance company was egregious enough to justify strong reproach. The only review given the punitive damage award in the *OSCO* decision is related to the insurer's ability to pay and the ratio between actual and punitive damages. In addition to this inadequate review, the trial and appellate courts improperly sustained the punitive damages award by referencing allegedly "bad conduct" by the defendant which was unrelated to the elected jury verdict. The trial and appellate courts sustained a verdict of actual damages on the basis of plaintiff's elected cause of action of negligent procurement of an insurance contract, which involved an independent insurance agent's failure to obtain the proper policy for the insured. However, the trial and appellate courts improperly upheld punitive damages on the basis of plaintiff's unelected cause of action for bad faith which involved alleged improper claims handling. In such a circumstance, a punitive damages award cannot be sustained since the

"facts" which underlie the decision are not sustained by the elected jury verdict.

II. SUMMARY OF ARGUMENT

The South Carolina Court of Appeals' appellate review of punitive damages in the *OSCO* decision ignores the principles enumerated by this Court in *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1 (1991) and its progeny. The scrutiny of the trial court and the appellate review did not ensure that the award was reasonable and rational. Instead, the award was sustained on the basis of testimony which was not related to issues and on the basis of "evidence" which was not before the *OSCO* Court. The testimony and evidence relied upon by the *OSCO* Court were related only to plaintiff's unelected cause of action for bad faith improper claims handling. The use of such irrelevant evidence demonstrates passion and prejudice in the review process itself.

At the close of the actual damages phase of the trial, plaintiff made his election, electing the cause of action of negligent procurement of the policy. No evidence was presented by either party in the punitive damages phase of the trial which showed any reckless conduct by defendants. No evidence of recklessness by defendants had been introduced relative to the negligent procurement cause of action. Despite this lack of evidence, punitive damages were sustained. The punitive damage award rested on facts relating to the processing of the plaintiff's insurance claim, an irrelevant and mutually exclusive consideration at the punitive damages stage of the trial. The decision thereby effectively prevents defendants

from being able to confront the evidence against them as to punitive damages since the trial court scrutiny and appellate review mandated by the *OSCO* opinion not only permitted, but justified, extraneous, irrelevant and prejudicial criteria for the award of such damages.

In addition, the Court of Appeals' decision punishes insurance companies for relying on written policy provisions, and permits an award of punitive damages for simple negligence in the absence of willful or reckless conduct.

III. ARGUMENT

A. The *OSCO* decision denies a defendant due process rights by requiring it to respond to inadmissible and unelected accusations in the punitive damages phase of a trial.

Cincinnati Insurance Company was found liable and assessed actual damages for the negligent failure to procure an insurance policy with certain coverage limits. (R. at 36-37, 45-46, 828). Under existing South Carolina law, Cincinnati would also be liable for punitive damages if the failure to obtain the desired limits was reckless, willful or wanton. *Scott by McClure v. Fruehauf Corp.*, 396 S.E.2d 354 (S.C. 1990). The award of punitive damages would then be limited by the degree to which Cincinnati was reckless in the failure to procure a policy with those limits. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Such an award would have to be justified on the basis of recklessness as to the tort for which Cincinnati was found liable and limited by the degree of that recklessness.

In *OSCO*, the South Carolina Court of Appeals justified its finding of recklessness on the basis of a different cause of action than the one establishing liability. The *OSCO* Court improperly evaluated the egregiousness of Cincinnati's alleged recklessness by reviewing and relying on actions by Cincinnati which were unrelated and irrelevant to the cause of action giving rise to liability for actual damages.

While the point at which to require an election of causes of action is usually left to the discretion of the trial court, the delay in requiring an election until after all evidence has been heard on conflicting and mutually exclusive causes of action obviously created confusion and prejudice on the part of the jury, and this very prejudice became the rationale for the trial and appellate courts' sustaining of the verdict. Normally, a trial court would strictly admonish a jury to disregard irrelevant "facts" regarding an unelected cause of action in the punitive damages phase of the case. Here, however, it is the *OSCO* Court itself which relied upon irrelevant "facts" regarding an unelected cause of action to justify the punitive damage award. In this way, the court sustained the finding of liability on the basis of the elected cause of action and the punitive damages on the basis of the unelected cause of action. This is akin to finding a person guilty of jaywalking and innocent of murder, and then sentencing him to death.

There is no evidence of recklessness on the part of the agent in procuring the policy. None has ever been exposed in any of the arguments of counsel at trial (R. at 834-869, 871-874), nor in any of plaintiff's numerous briefs, nor in the oral findings at trial by the trial judge

(R. at 980-984), nor in the written opinion of the trial court, nor in the opinion of the South Carolina Court of Appeals. There is and can be no basis for such a finding. The only allegations of wrongdoing which have ever been cited which could lead to a finding of egregious conduct such as to support an award of punitive damages are conclusory statements drawn from irrelevant and contested evidence pertaining to an unelected cause of action. The reviewing court has no standing to make "findings of fact" where the "facts" do not pertain to the cause of action that is supposed to be before the Court. *Waldron v. Waldron,* 156 U.S. 361 (1895). (The trial court has the duty to correct an error arising from the erroneous admission of evidence).

Because the *OSCO* decision encourages the consideration of "evidence" of conduct outside the record of the case in assessing punitive awards, it is impossible to estimate punitive damage exposure or competently defend against such exposure. At a minimum, appellate courts have a duty to see that punitive awards are reasonable and fair based on the cause of action with which a given company is charged. To do less is to perpetuate prejudice and deny a litigant the right to know what conduct it will have to account for.

B. The *OSCO* decision represents an unreasonable and prejudicial approach to the review of punitive damage awards that is violative of due process protections.

The proper, and constitutionally required, standard of review of punitive damages awards was not adhered

to by the trial or appellate courts. Neither court considered or found any misconduct by the insurer relative to the findings of liability. The only considerations seriously addressed by the courts were the wealth of the insurance company and the ratio between actual and punitive damages. No other considerations were addressed. The "misconduct" that was considered should have been declared irrelevant, not the basis for an award.

Result-oriented decisions are dangerous. In this case, in order to sustain the actual damages awarded, the trial and appellate courts had to: (1) reverse longstanding law on the duty of an insured to read its policy; (2) find that an insured is justified in not recognizing or disclosing that his address and coverage limits are not correctly listed on the scheduled property on his declarations sheet and billing statements; (3) hold that the failure to read a policy and avail oneself of its terms by an insured – although a bar to a suit for intentional misrepresentation – is nonetheless not a bar for mere reckless omission; (4) permit "expert" testimony to the effect that no one really adheres to his legal obligations anyway; and (5) permit simultaneous findings of liability on separate causes of action which are stipulated to be mutually exclusive to stand.

Because of a delayed election of plaintiff's cause of action, the jury, the trial court and the appellate court were exposed to "evidence" which normally would have been totally excluded. This "evidence" became the sole basis for sustaining the punitive damages award so far as findings of misconduct are concerned.

Even with no objection, appellate courts have a duty to review a case so that punitive damage awards are reasonable and rational. But here, the trial court knowingly invited an election. The trial court was then requested to explain to the jury the effect on the evidence of such an election. Such an explanation is the clear duty of the court. The court declined to give a meaningful charge (or any charge) on the effect of the election, although the election was tantamount to a defense verdict on the unelected causes of action. The trial court then sustained the punitive damages award based on ***all*** the evidence. This error in conducting a meaningful review was repeated by the appellate court which not only adopted virtually verbatim all the opinions of the trial court but allowed plaintiff to claim as the record on appeal the entire trial transcript.

The trial court permitted evidence to be heard about mutually exclusive causes of action. The court was then requested to acknowledge that damages were to be limited to those relevant to the cause of action elected and to so advise the jury. The trial court refused to do this and then justified the jury's punitive damages award on the basis of "evidence" from the unelected causes of action. The appellate court in its review affirmed this process. In so doing, both the trial and appellate courts abrogated their duty to appropriately review the award of punitive damages.

IV. CONCLUSION

For these reasons, the South Carolina Defense Trial Attorneys Association respectfully requests that this Court grant the Petition of Certiorari.

Respectfully submitted this 6th day of September, 1995.

STEPHEN P. GROVES
YOUNG, CLEMENT, RIVERS &
TISDALE, L.L.P.
P. O. Box 993
Charleston, SC 29402-0993
(803) 724-6688
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